

IT IS SO ORDERED.

Dated: 12:03 PM January 30 2006


MARILYN SHEA-STONUM **LN**
U.S. Bankruptcy Judge



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:	)	CASE NO. 03-50480
)	
JOAN ALLYN KODISH,	)	CHAPTER 7
DEBTOR(S))	
	)	JUDGE MARILYN SHEA-STONUM
)	
LAUREN HELBLING,	)	ADVERSARY NO. 03-5122
PLAINTIFF(S),)	
)	
vs.	)	MEMORANDUM OPINION RE: MOTION
	)	FOR SUMMARY JUDGMENT [DOCKET
JOAN ALLYN KODISH,	)	#23] AND RESPONSE THERETO [DOCKET
DEFENDANT(S).	)	#26]

On September 28, 1999 Triangle Development, Inc. ("Triangle") through counsel, Joan Allyn Kodish, filed a chapter 11 bankruptcy petition in the Cleveland court location of the U.S. Bankruptcy Court for the Northern District of Ohio. On February 19, 2002 the Triangle bankruptcy case was converted to a chapter 7 and Lauren Helbling ("Helbling" or "Plaintiff") was appointed as the trustee to administer that case. On January 31, 2003 Joan Allyn Kodish ("Kodish" or "Defendant-Debtor") filed a chapter 13 bankruptcy petition in this court location. Her case was converted to a chapter 7 on March 28, 2003.

On June 20, 2003 Helbling, in her capacity as the chapter 7 trustee for the Triangle bankruptcy, filed a complaint against Kodish objecting to the dischargeability of the retainer paid to Kodish in relation to the Triangle bankruptcy case which she had been ordered to disgorge. On May 12, 2004, Plaintiff filed a motion for summary judgment [docket #23] and on July 13, 2004 Defendant-Debtor filed her response [docket #26].

During a status conference which addressed, *inter alia*, the pending motion for summary judgment, counsel indicated to the Court that the matters at issue in this adversary proceeding were dependent upon resolution of a matter in an adversary proceeding then pending before Judge Morgenstern-Clarren and related to the Triangle bankruptcy case (the “Triangle Adversary”). Counsel also represented to the Court that their clients agreed to be bound by all legal findings made in the Triangle Adversary. Accordingly, this Court abated this adversary proceeding pending the issuance of an order in the Triangle Adversary. A Memorandum Opinion and an Order were issued in the Triangle Adversary on July 19, 2005 (collectively, the “Triangle Adversary Decision”) and this adversary proceeding was then placed back on this Court’s active docket. [A copy of the Triangle Adversary Decision is attached hereto as Exhibit A and incorporated by this reference as if fully rewritten herein].

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and 157(b).

SUMMARY JUDGMENT STANDARD

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." F ED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact and then the burden shifts to the nonmoving party to show the existence of a material fact which must be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). Upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991).

STIPULATED FACTS

On May 7, 2004, Plaintiff and Defendant-Debtor filed the following list of stipulated facts in this adversary proceeding. *See* Stipulations [docket #20].

1. Joan Kodish was retained as bankruptcy counsel on behalf of Triangle, to file a chapter 11 bankruptcy on Triangle's behalf.
2. A chapter 11 petition was filed on behalf of Triangle on September 28, 1999.
3. The Triangle bankruptcy case was converted to one under chapter 7 on February 19, 2002.
4. Lauren A. Helbling is the appointed chapter 7 trustee in the Triangle bankruptcy case. She was appointed to such position on February 25, 2002.
5. Joan Kodish received a \$10,000 retainer from a combination of A&A Paving, Inc. and/or Alfred Edwards for her legal services rendered relative to the filing [of] the Triangle bankruptcy.

6. The \$10,000 was received by Joan Kodish prior to the time the petition was filed.
7. The source of the \$10,000 retainer was an entity other than Triangle.
8. Joan Kodish spent the money without filing a fee application or obtaining a court order.
9. Joan Kodish did not segregate the retainer and spent the retainer shortly after the case was filed.
10. Joan Kodish presently has no records of how she disbursed the retainer funds.
11. Joan Kodish obtained a guarantee of her fee from an insider before the case was filed.
12. Joan Kodish represented two of the Debtor's shareholders in their own Chapter 13 bankruptcy cases during the Triangle chapter 11 case.
13. Joan Kodish personally invested in an entity that had also agreed to guarantee her fees in the Triangle case and failed to timely disclose same.
14. Joan Kodish has been ordered to disgorge the \$10,000 fee. Joan Kodish has paid a total of \$1,000 to the clerk.
15. This Court has core jurisdiction over the matters pled in this adversary proceeding.

DISCUSSION

Through the complaint Plaintiff sets forth two counts alleging that, pursuant to § 523(a)(4), the \$10,000.00 retainer paid to Defendant-Debtor for her work in the Triangle bankruptcy case constitutes a debt that is owed to Triangle and not dischargeable in Defendant-Debtor's chapter 7 bankruptcy case. Section 523(a)(4) of the Bankruptcy Code provides that a chapter 7 discharge does not discharge an individual debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). In her motion for summary judgment, Plaintiff sets forth a detailed analysis of how, pursuant to the undisputed facts of this case and applicable Sixth

Circuit and Ohio law, the relationship between Defendant-Debtor and Triangle was a fiduciary one and how Defendant-Debtor's actions relative to the retainer constituted defalcation. *See* Motion for S.J. [docket #23] at pp. 3-6. Based upon that analysis, the Court finds that Plaintiff has met her initial burden of demonstrating that there is an absence of a genuine dispute over any material fact regarding each element of § 523(a)(4) of the Bankruptcy Code.

In her response to Plaintiff's motion for summary judgment, Defendant-Debtor does not challenge Plaintiff's analysis that Defendant-Debtor engaged in defalcation while acting in a fiduciary relationship with Triangle. Instead, Defendant-Debtor contends that Plaintiff has no standing to bring this adversary proceeding because the retainer is not property of Triangle's bankruptcy estate as it was paid to Defendant-Debtor by a third party. That issue was considered and decided by Judge Morgenstern-Clarren in the Triangle Adversary Decision.

Through the Triangle Adversary, Helbing requested a declaratory judgment that the retainer paid to Kodish in relation to the Triangle bankruptcy case is an asset of the Triangle bankruptcy case. One of the named defendants and principal of Triangle, Alfred Edwards, filed opposition to Helbing's request for a declaratory judgment and claimed an interest in the retainer. Through his opposition, Mr. Edwards acknowledged that he paid the retainer on behalf of Triangle but argued that members of his family helped him make the payment and that the retainer should be returned to them. Based upon the undisputed facts of that case Judge Morgenstern-Clarren found the following:

The retainer was paid to Ms. Kodish for services she was to provide in the Triangle chapter 11 case. As a result of this court's earlier orders, Ms. Kodish is not entitled to any fees for her services and must return the retainer. As discussed below, the retainer became property of the [Triangle] chapter 11 estate when the chapter 11 case was filed, and to the extent no other party has an interest in the retainer, it is property of the chapter 7 estate.

The filing of a bankruptcy case creates an estate which includes “all legal and equitable interests of the debtor in property as of the commencement of the case[.]” 11 U.S.C. §541(a)(1). When a case is converted from chapter 11 to chapter 7 before confirmation, property of the chapter 11 estate generally remains property of the chapter 7 estate. *See* 11 U.S.C. § 348(a) Retainers paid to debtor’s counsel in a chapter 11 case are to be held in trust for the debtor under federal bankruptcy law. *See Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, 663 (6th Cir. 2004); *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 478 (6th Cir. 1996). Consequently, a debtor has an equitable interest in the retainer and that interest is property of the chapter 11 estate. *Id.* This is so even if the source of the retainer is someone other than the debtor. *In re Downs*, 103 F.3d at 478 (holding that a retainer paid by a third party is held in trust and the debtor has an equitable interest in it). Based on this case law, the retainer was an asset of the chapter 11 estate [of Triangle] and on conversion it became an asset of the chapter 7 estate.

Mr. Edwards has not cited any relevant facts nor has he presented any legal authority to support a determination that the retainer is not property of the chapter 7 estate or to require an evidentiary hearing on the issue. His opposition to the trustee’s motion is based on his assertion that relatives helped him make the payment and the retainer should be returned to them. Even overlooking the fact that he did not support his statements through admissible evidence such as an affidavit, he did not identify those individuals, provide any proof of their participation in the retainer, and did not explain the legal basis to show that the retainer should be paid to them. Additionally, Mr. Edwards’s request that the retainer be returned to his family is inconsistent with the answer which he filed in this proceeding in which he characterized the payment as an investment rather than a loan. (Docket 67). In sum, Mr. Edwards has not demonstrated the existence of any fact which must be tried in this matter and he has not provided any basis for determining that the retainer is not an asset of the [Triangle] chapter 7 estate.

Based on the undisputed facts, the retainer is an asset of the Triangle chapter 7 estate and the trustee is entitled to summary judgment on her amended complaint.

See Exhibit A at pg. 6-7.

CONCLUSION

Based upon the undisputed facts in this case, the unchallenged analysis set forth in Plaintiff’s motion for summary judgment, the findings set forth in the Triangle Adversary Decision and the parties’ agreement to be bound by the findings in the Triangle Adversary Decision, this Court finds

#

JOAN KODISH, Defendant-Debtor
4252 Janwood Drive
Copley, OH 44321

EXHIBIT A
Helbling. v. Kodish (In re Kodish), #03-5122
MEMORANDUM OPINION RE: MOTION FOR SUMMARY JUDGMENT [DOCKET #23]
AND RESPONSE THERETO [DOCKET #26]

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Official Time Stamp
U.S. Bankruptcy Court
Northern District of Ohio
July 19, 2005
(3:42 p.m.)

In re:	)	Case No. 99-17499
)	
TRIANGLE DEVELOPMENT, INC.,	)	Chapter 7
)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
)	
LAUREN A. HELBLING, TRUSTEE,	)	Adversary Proceeding No. 03-1540
)	
Plaintiff,)	
)	
v.	)	<u>MEMORANDUM OF OPINION</u>
)	
JOAN KODISH,)	
)	
Defendant.)	

Triangle Development, Inc. filed a chapter 11 case on September 28, 1999. A series of orders entered in that case require attorney Joan Kodish to disgorge the \$10,000.00 retainer she received in connection with the filing. The case was later converted to chapter 7. The trustee filed this adversary proceeding against Ms. Kodish requesting a declaratory judgment that the retainer is an asset of the chapter 7 estate. After the trustee received a default judgment, the trustee and Ms. Kodish agreed to vacate that judgment and resolve the issue on the merits. The trustee then moved for summary judgment and Ms. Kodish filed a cross-motion for summary judgment based on stipulated facts. The court denied both motions because the stipulated facts did not provide a basis for decision and additional parties needed to be joined to resolve the dispute. (Docket 40, 41).

The trustee then filed an amended complaint, adding Alfred Edwards¹ and A&A Quality Paving, Inc. as defendants because both arguably had an interest in the funds that required notice and an opportunity to respond to the declaratory judgment complaint. A&A Quality Paving did not respond to the amended complaint and the court entered default judgment against it. Joan Kodish answered and did not claim an interest in the funds. Neither A&A Quality Paving nor Joan Kodish, therefore, has an interest in the property. After some delay,² Alfred Edwards responded to the amended complaint and claimed an interest.

The trustee moves through an amended motion for a determination that the money is property of the estate. She relies on the stipulated facts earlier agreed to with Ms. Kodish, and Mr. Edwards expressly stated that he also agrees with them. He offers additional facts as well in his opposition to the motion. (Docket 72, 79). Under these circumstances, the trustee's motion is appropriately treated as a request for summary judgment. *See* FED. R. CIV. P. 56 (made applicable by FED. R. BANKR. P. 7056). For the reasons stated below, the trustee's motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

¹ Alfred Edwards is the debtor's principal.

² Alfred Edwards is incarcerated and is representing himself.

FACTS

Most of the relevant facts are set forth in this court's January 18, 2005 memorandum of opinion addressing the cross-motions for summary judgment:

Triangle Development, Inc. filed a chapter 11 petition on September 28, 1999. Ms. Kodish received a \$10,000.00 retainer to represent the debtor. Ms. Kodish eventually admitted that, contrary to the bankruptcy code and rules, she commingled the retainer with her personal and business funds and spent the money without filing a fee application and without court permission.

To try to remedy this, Ms. Kodish belatedly filed a fee application. The United States trustee objected to the application and requested disgorgement of all fees because Ms. Kodish (1) failed to hold her prepetition retainer in a client trust account; and (2) represented insiders during the case without making full disclosure. Ms. Kodish attempted to moot this issue by filing a notice that she was withdrawing her fee application and yet intended to keep the retainer. The court treated her notice as a motion and granted her conditional leave to withdraw the application. The conditions of withdrawal required: (1) Ms. Kodish to deposit \$10,000.00 into the court pending a hearing to determine whether the funds should go to the debtor or to some third party; (2) that Ms. Kodish not seek or accept any payment of fees for her services in the Triangle case; and (3) that the application for fees be dismissed with prejudice. Ms. Kodish did not object to these conditions and they became final, requiring her to deposit the funds into court.

When Ms. Kodish failed to deposit the funds, the court held her in contempt, after notice and a hearing. Before imposing sanctions, the court gave Ms. Kodish a final opportunity to either pay the funds or propose a payment plan. The court then ordered into effect the payment plan which she herself proposed. Once again, Ms. Kodish failed to meet her obligations.

On January 31, 2003, Ms. Kodish filed her personal bankruptcy case in Akron. The Triangle chapter 7 trustee filed an adversary proceeding in the Akron case to determine whether Ms. Kodish's obligation to disgorge the retainer is a dischargeable debt.

(Docket 40) (footnotes omitted). Ms. Kodish's bankruptcy case is assigned to the Honorable Marilyn Shea-Stonum. Judge Shea-Stonum abated the dischargeability proceeding to permit the parties to bring the issue regarding property of the Triangle estate to this court.

These additional facts are uncontested:

Joan Kodish received the \$10,000.00 retainer from Alfred Edwards before she filed the Triangle bankruptcy petition.³ Orders of this court require Ms. Kodish to deposit \$10,000.00, representing the retainer, with the clerk of court. Ms. Kodish has deposited \$1,000.00 of that amount with the clerk. (Docket 35, 79).

DISCUSSION

The Trustee's Motion

The trustee moves for a final determination that the \$1,000.00 on deposit with the court and the remaining \$9,000.00 which Ms. Kodish is required to pay into court (collectively, the retainer) is property of the Triangle chapter 7 estate. Mr. Edwards opposes this request. He acknowledges that he paid the retainer on behalf of the debtor, but argues that members of his family helped him make the payment and the retainer should be returned to them. When matters outside the stipulations and pleadings are at issue, the motion is appropriately treated as one for summary judgment.

The Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c)

³ The trustee and Joan Kodish stipulated that either A&A Paving or Alfred Edwards made the payment. In Mr. Edward's opposition to the trustee's motion, he confirms that he made the payment. (Docket 35, 79).

(made applicable by FED. R. BANKR. P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

Property of the Estate

_____The retainer was paid to Ms. Kodish for services she was to provide in the Triangle chapter 11 case. As a result of this court’s earlier orders, Ms. Kodish is not entitled to any fees for her services and must return the retainer. As discussed below, the retainer became property of the chapter 11 estate when the chapter 11 case was filed, and to the extent no other party has an interest in the retainer, it is property of the chapter 7 estate.

The filing of a bankruptcy case creates an estate which includes “all legal and equitable interests of the debtor in property as of the commencement of the case[.]” 11 U.S.C. § 541(a)(1). When a case is converted from chapter 11 to chapter 7 before confirmation, property of the chapter 11 estate generally remains property of the chapter 7 estate. *See* 11 U.S.C. § 348(a)

(conversion of a case from chapter 11 to chapter 7 “does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.”). Retainers paid to debtor’s counsel in a chapter 11 case are to be held in trust for the debtor under federal bankruptcy law. *See Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, 663 (6th Cir. 2004); *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 478 (6th Cir. 1996). Consequently, a debtor has an equitable interest in the retainer and that interest is property of the chapter 11 estate. *Id.* This is so even if the source of the retainer is someone other than the debtor. *In re Downs*, 103 F.3d at 478 (holding that a retainer paid by a third party is held in trust and the debtor has an equitable interest in it). Based on this case law, the retainer was an asset of the chapter 11 estate and on conversion it became an asset of the chapter 7 estate.

Mr. Edwards has not cited any relevant facts nor has he presented any legal authority to support a determination that the retainer is not property of the chapter 7 estate or to require an evidentiary hearing on that issue. He acknowledges that he made the \$10,000.00 prepetition payment to Ms. Kodish as a retainer. His opposition to the trustee’s motion is based on his assertion that relatives helped him make the payment and the retainer should be returned to them. Even overlooking the fact that he did not support his statements through admissible evidence such as an affidavit, he did not identify those individuals, provide any proof of their participation in the retainer, and did not explain the legal basis to show that the retainer should be paid to them. Additionally, Mr. Edwards’s request that the retainer be returned to his family is inconsistent with the answer which he filed in this proceeding in which he characterized the payment as an investment rather than as a loan. (Docket 67). In sum, Mr. Edwards has not

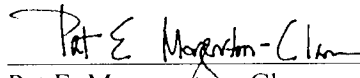
demonstrated the existence of any fact which must be tried in this matter and he has not provided any basis for determining that the retainer is not an asset of the chapter 7 estate.

Based on the undisputed facts, the retainer is an asset of the Triangle chapter 7 estate and the trustee is entitled to summary judgment on her amended complaint.

CONCLUSION

For the reasons stated, the trustee's motion is granted. A separate order will be entered reflecting this decision.

Date: 19 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

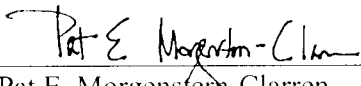
Official Time Stamp
U.S. Bankruptcy Court
Northern District of Ohio
July 19, 2005
(3:44 pm)

In re:	)	Case No. 99-17499
)	
TRIANGLE DEVELOPMENT, INC.,	)	Chapter 7
)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
)	
LAUREN A. HELBLING, TRUSTEE,	)	Adversary Proceeding No. 03-1540
)	
Plaintiff,)	
)	
v.	)	<u>ORDER</u>
)	
JOAN KODISH,)	
)	
Defendant.)	

For the reasons stated in the memorandum of opinion filed this same date,

IT IS, THEREFORE, ORDERED that the trustee's amended motion for final determination regarding whether disgorged fees are property of the estate is granted. (Docket 72). The \$10,000.00 retainer paid to attorney Joan Kodish in connection with the Triangle chapter 11 case is determined to be property of the Triangle chapter 7 estate and the clerk of court is directed to transmit the \$1,000.00 which Ms. Kodish deposited with the court in connection with this matter to the chapter 7 trustee.

Date: 19 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center